UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

SPENCER MEYER, individually and on behalf of those similarly situated,

Plaintiffs,

v. 15-CV-9796 (JSR)

TRAVIS KALANICK,

Defendant. Oral Argument

----------x

New York, N.Y.
March 9, 2016
3:38 p.m.

Before:

HON. JED S. RAKOFF,

District Judge

APPEARANCES

HARTER, SECREST & EMERY LLP
Attorneys for Plaintiffs
BY: BRIAN M. FELDMAN, ESQ.
EDWIN M. LARKIN, III, ESQ.
JEFFREY A. WADSWORTH, ESQ.

ANDREW SCHMIDT LAW PLLC
Attorneys for Plaintiffs
BY: ANDREW A. SCHMIDT, ESQ.

BOIES, SCHILLER & FLEXNER LLP
Attorneys for Defendant
BY: WILLIAM A. ISAACSON, ESQ. PETER M. SKINNER, ESQ.

UBER TECHNOLOGIES, INC.
BY: LINDSEY HASWELL, ESQ., Senior Counsel
For Defendant

(Case called)

MR. FELDMAN: Good afternoon, your Honor. Brian Feldman with my colleagues Jeff Wadsworth, Andy Schmidt, and Ed Larkin, for plaintiff Spencer Meyer.

THE COURT: Good afternoon.

MR. ISAACSON: Good afternoon, your Honor. Bill Isaacson from Boies Schiller for the defendant.

MR. SKINNER: Peter Skinner from Boies Schiller for defendant.

MS. HASWELL: Good afternoon, your Honor. Lindsey Haswell from Uber Technologies, Inc., on behalf of Mr. Kalanick.

THE COURT: Good afternoon.

All right. We're here to hear argument on the motion to dismiss the first amended complaint. Let me hear from moving counsel first.

MR. ISAACSON: Thank you, your Honor.

At this point the complaint boils down to an allegation that there's a horizontal conspiracy amongst the Uber driver-partners that's based on individual contracts between Uber and the individual driver-partners.

THE COURT: They're all the same contract, aren't they?

MR. ISAACSON: I don't actually know they're all exactly the same, but for purposes of this motion, I think you

can assume that they are fundamentally the same.

And that's self-evident in the complaint at paragraphs 2, 68, and 70, which indicates that it's Uber, according to the allegations of the complaint, and not the driver-partners that are responsible for pricing. The opposition to the motion to dismiss makes this crystal clear, saying that the Uber driver-partners have, quote, no direct control over prices, the competition does not happen due to the Uber app, and that Uber driver-partners, quote, relinquish all pricing responsibilities to the --

THE COURT: Well, as I understand the allegation -- correct me if I'm wrong -- the Uber drivers are agreeing to what they know will, as a practical matter, make their prices identical for all the Uber drivers and so they may not have a choice in the sense that Uber only makes the technology available on these pricing terms. But nevertheless, they know -- or at least that's what I understood the allegation to be -- that they'll all be charging the same price.

MR. ISAACSON: Right. So if you insert that the agreement here is between Uber and the Uber driver-partners, I would agree with you that that's the allegation, as opposed to an agreement between the driver-partners. So for example, if a car for hire company hires independent contractors and says, for a trip to the airport, we're going to charge $50, and everybody signs, and everybody who contracts with them charges

$50 for a trip to the airport, that is a legal, vertical relationship that does not become a horizontal conspiracy amongst the drivers. And that's what the --

THE COURT: Yes, but the relationship there is a little bit different because Uber only holds itself out as being a facilitator of and a supplier of the programming to accomplish this, so at least for many purposes, it holds itself out as the headless horseman, yes?

MR. ISAACSON: I don't agree with that characterization, but for purposes of an antitrust claim --

THE COURT: Probably they don't use horses anymore.

MR. ISAACSON: So to be precise, Uber has suggested prices for Uber driver-partners. I don't think the fact of whether those are suggested prices or mandatory prices are relevant at the motion to dismiss stage.

THE COURT: Why? Let's assume they're mandatory.

MR. ISAACSON: Because in a vertical contract, I can say to a contractor, this is what you're going to charge. That is a perfect -- and otherwise I'm not going to deal with you. That has been the law for over a hundred years and has been increasingly resoundingly the law as we've moved into cases like *Leegin* and whatnot. That vertical relationship is procompetitive because it allows a brand to compete against other brands and promote new entrants. There's absolutely no authority and it would be contrary to antitrust doctrine to say

that if we're going to offer an attractive service or product at a certain price and if we're going to deal together, that's how we're going to deal in a vertical relationship. That does not transfer into a horizontal relationship amongst the people who say yes. That's an attractive relationship that I would like to buy into. All that does is become an attractive alternative for consumers, and it's not in any sense a horizontal conspiracy amongst the people who agree to that attraction. If a McDonald's franchisee says, I like the suggested price for the Big Mac or the mandatory price for the Big Mac and McDonald's all over the nation charges their price for the Big Mac, that is not a horizontal conspiracy amongst the contracting franchisees. So once you accept the allegation of the complaint that this is from a contract that is vertical and whether it's suggested or mandatory, you can leave it as a factual issue for later, and in either respect, that is a legal relationship, and it's also an implausible conspiracy, which I think was the first point in our brief. I mean, if you accept that this is a horizontal conspiracy, just by virtue of the fact the driver-partners say, yes, I'd like to agree to this contract because this looks like a good business for me to get into, then you have a conspiracy of hundreds of thousands of people who have never met each other sprawled across the nation, all of whom are jointly and severally liable and potentially criminally liable for what is now being alleged to

be a horizontal price-fixing conspiracy, and that simply cannot be the case. This is much --

THE COURT: I think your second argument is the stronger one than the first. Let's take a more extreme example. Supposing someone said, please sign up to use our logo, or something like that, and if you do that, we will guarantee you that it will be enforced in such a way that there will be no competition among all the users because as a condition of using this logo, you all have to charge the exact same price, and you then go ahead and sign up and you say to yourself, terrific, I won't be involved in any price competition as a result because I and all the other folks who sign up for it are going to have exactly the same price. Why would that be implausible? I understand the horizontal/vertical aspect of that, but you're saying independent of that, there is an implausibility. Why is it implausible at all? You know that everyone who is joining this is making that agreement with you.

MR. ISAACSON: The reason it's implausible -- and I think this flows directly from *Twombly* -- is, you are describing conduct that is naturally explainable by legal events. And it's more implausible than *Twombly* because you have so many different actors. The one thing the *Twombly* plaintiffs had going for them was a limited group of telephone companies that they were making an accusation of. Here, right,

they actually made an agreement amongst hundreds of thousands of people to fix prices. That becomes much less plausible when you compare it to the natural explanation of what is happening is, we are entering into an independently advantageous business relationship, which is why we make that argument as well as the vertical argument. I do think your Honor understands that. In your hypothetical, you mentioned restricting competition without any actual examples of whether there was exclusionary conduct in that example, but even if there was exclusionary conduct in that example, you describe the action of one actor and not a horizontal conspiracy. You would be describing a Section 2 case in that example. And here, again, this is not, this is a Section 1 case requiring an agreement, and as long as what their allegations are is that the agreement is between Uber and the individual driver-partners --

THE COURT: No, that's your second argument.

MR. ISAACSON: But again, it's highly implausible and I think devoid of reality to suggest that all of the --

THE COURT: Don't stop there.

MR. ISAACSON: Well, I'll tone down the rhetoric, but you don't see anything quite like this, the idea that you would have a price-fixing agreement amongst all these disparate people and all these different markets all around the nation, none of whom know each other -- occasionally they may go to a picnic together -- and that the --

THE COURT: But only if they can get a good ride.

Anyway, I do understand your other argument now. So maybe it's time to hear from your adversary, unless there was something else you wanted to particularly draw to my attention.

MR. ISAACSON: No. Everything else is in the briefs, your Honor.

THE COURT: Very good. Thanks a lot.

MR. FELDMAN: Thank you, your Honor. Brian Feldman for plaintiff.

Your Honor, actually the complaint pleads both a per se argument and a rule of reason argument. To start with the per se, which is a horizontal agreement, we concede that Uber is a new technology that allows what may not have been plausible before but what very certainly is the case here, which is the identical terms sent to thousands or tens of thousands of drivers and agreed to, like the logo hypothetical your Honor posed.

The best place to start to explain our theory of horizontal concerted action here is actually, if I may borrow from a quote, if you'll stay with me for a few lines here:

The effect of holding otherwise would be to create a loophole in the enforcement of the antitrust laws which is available in no other sort of conspiracy. Suppose that a group of laborers were mutually and financially interested in an act of trespass. Suppose that the ringleader wrote a letter to

each of them pointing out the nature of the general plan, offering financial inducements, and asking that each agree to assist him in the enterprise. It could scarcely be contended that in order to make that conspiracy complete, there would have to be any further agreement between those who were hired or contracted to assist the ringleader.

Your Honor, that is a quote from Justice Jackson, who was then the solicitor general, in the *Interstate Circuit* argument. What he's explaining there is exactly what we're arguing here. His argument to the court, which was accepted, is that not every horizontal conspiracy requires an express agreement between horizontal competitors, and the section of his brief that I read from makes the argument, which is what we make, that even if the Court found, as it did, that there wasn't sufficient evidence of an express agreement between the film companies in *Interstate Circuit*, it could still find concerted action among the horizontal players. They were still linked with each other, in Justice Jackson's words in that phrase. That's a good starting point for our horizontal conspiracy because it ties together the two arguments we're making in our brief and in this case. The first is, as the Supreme Court agreed --

THE COURT: If it's not a horizontal conspiracy, do you lose this motion?

MR. FELDMAN: No, your Honor. There's a rule of

reason argument that is pled. We actually plead rule of reason in the complaint, and of course we go through all of the elements of rule of reason in the complaint as well, including market definition, anticompetitive harm, and adverse effects, as well as the lack of any procompetitive justifications. So there is a rule of reason argument here that we've both extensively briefed, and the case survives even without the horizontal conspiracy. But the horizontal conspiracy is correct. It's correct because of *Interstate Circuit*, which stands for the proposition that vertical players acting opportunistically in inviting horizontal competitors to form the cartel that they would all naturally want to form is a violation of Sherman 1. And the second reason, also reflected in the quote I read, is that there can be a conspiracy under longstanding conspiracy principles between actors who must act together either, in the Jackson example, in a plan that they've hatched, or in the marketplace examples we talked about in our brief, like in *Silk Road*, where each of their participation is required in order to make the scheme work.

Your Honor, to start with, *Interstate Circuit* is probably the easiest argument to start with because it's a controlling Supreme Court precedent. And as I say, it prohibits the opportunistic behavior by vertical actors like defendant Kalanick, who are simply inviting horizontal competitors to form a cartel as they would naturally want to

do. The holding of *Interstate Circuit* is that there can be a horizontal conspiracy in the absence of any agreement other than a series of vertical agreements, just like the case here. And the elements of that holding are that: (1) there was a common motive to conspire; (2) each competitor was given a substantially similar invitation, which was an open invitation to engage in the conspiracy, and success depended on the cooperation, what the court there called substantial unanimity --

THE COURT: I understand all that, but in going to defendant's first argument, why is that plausible as opposed to just the natural, these are drivers who want to get fares and this is a computerized system that will place them in contact with their fares expeditiously and that's a very valuable thing for them?

MR. FELDMAN: It's plausible; in fact, it's not merely plausible. Most of the elements of *Interstate Circuit* have been conceded here, meaning the fact that they all received a substantially identical invitation with price fixing as a term is not in dispute in this motion, and that success depends on their cooperation can't be in dispute.

So the question is, really, the first element, a common motive to conspire, why is that plausible here? It's plausible because with the price fixing as alleged in the complaint, the fares for all of the drivers are increased.

This is an all boats rise situation. What they have in common is an interest in above-market prices for fares, and that is the common motive. It's no different, your Honor, than the common motive in *Interstate Circuit*, where the motive there was for the film companies, United Artists and Twentieth Century Fox, to increase their revenue for first-run films, and they all had that same interest. They could have, absent the Sherman Act, formed a cartel to do that, but they were invited to do so by Interstate Circuit, and the Supreme Court held that that was a conspiracy, just as if they had formed a cartel themselves.

THE COURT: So there you had, what, a dozen corporations or so engaging in this and here you're talking about thousands of drivers, yes?

MR. FELDMAN: That's the genius of the defendant and the company, your Honor, and the genius is taking advantage of the internet technology of today in order to do essentially the same thing, take a group of competitors, even though it's a larger group of competitors -- the only challenge here is coordination. That's the difference between the small group and the large group is there's a coordination problem. Easier to coordinate a small group of ten to get them to the same agreement and to coordinate a group of ten to make sure no one's cheating, but the defendant, through Uber, has figured all of that out. They have the ability to invite on their app,

just with a swipe of the finger, each of these driver-partners to agree to the same terms, so there's no coordination problem, they've solved it, and there's no cheating problem that a cartel would normally have because they've controlled, they've taken the pricing out of the control of the individual drivers. So if we weren't talking about this today but before the advent of the technology, it would be implausible, but it's entirely plausible today. In fact, that's exactly what Uber has to offer. It's one of the things it has to offer. It allows the collective action problem of tens of thousands of drivers, if there are that many, to be solved very simply through an elegant app.

THE COURT: I should mention for the record that I don't have the Uber app, although now we're talking about the passenger app, but I don't have any Uber app. I've never used Uber. And so I have what is always the prime requirement for any federal judge in hearing a case, which is total ignorance. But anyway, go ahead.

MR. FELDMAN: Certainly, your Honor.

Defendant in reply concedes, on page 4 of the reply brief, that *Interstate Circuit* applies when there are two conditions, both of which are actually satisfied here, and those conditions are: first, to use defendant's brief, defendant on page 4 says, where a party enters a vertical agreement on the condition that its competitors do the same;

and the second element cited by defendant is that the vertical agreement was against the party's own economic self-interest. We don't have a disagreement there. When those conditions both apply, when those elements are both present, *Interstate Circuit* should control. And both of them are present here. The defendants cite the *Apple* opinion, which is helpful authority here. What *Apple* meant by the first element --

THE COURT: Just going back to the question I raised a minute ago --

MR. FELDMAN: Sure.

THE COURT: -- why wouldn't a driver be motivated to use this app that puts them in such rapid contact with their passengers, even if other drivers were charging different rates? I mean, supposing the app was different and it simply said, we'll make contact between you and your prospective passengers and you'll work out the rates individually with each passenger, wouldn't they have the same motivation to sign up that they have now?

MR. FELDMAN: They very well might, your Honor. What would be different in that case is none of them would on their own accept the condition that they are tied to the rates set by Uber and set by the defendant, right? So with the current Uber app, as we pled in the complaint, the way it works is that there is no competition among the drivers on the Uber platform. All of them are guaranteed the same price for the same service.

If we had a platform like another app mentioned in the complaint called Sidecar, where there could be negotiations between the driver and the passenger, free economics would apply and they would find their own rates. What we are arguing under the *Interstate Circuit* rubric is that if we had that free system as in Sidecar, where riders and drivers could reach their own rates, no driver would agree that his rates would be set at an artificially high rate that he could not negotiate with passengers, and that's the distinction we're drawing. And that's the state in *Interstate Circuit* as well. It was certainly possible for any of those film companies to agree to tie their hands and reduce their second-run films, but it wasn't in anyone's interest to do that unless they had substantial unanimity.

THE COURT: Okay. Anything else you wanted to raise?

MR. FELDMAN: Well, your Honor, the other prong of the horizontal conspiracy theory here goes back to traditional common law and criminal law conspiracy, and we've cited the *Silk Road* case, so even putting aside *Interstate Circuit*, which should control here, under common law conspiracy, the fact that this marketplace, this platform, Uber, requires each of the drivers to participate for the platform to exist, renders this a full single conspiracy, and we've analogized to the *Silk Road* case. I'm not sure if your Honor is familiar with it. Okay. In *Silk Road* --

THE COURT: You're talking about *United States v. Ulbricht*?

MR. FELDMAN: That's correct.

THE COURT: Decided in quite a good court, the Southern District of New York --

MR. FELDMAN: That's right, your Honor.

THE COURT: -- on January 7, 2015, and reported at 79 F. Supp. 3d. 486. That's the case you're talking about?

MR. FELDMAN: That's correct.

THE COURT: I have no knowledge of that case at all.

MR. FELDMAN: So just as in that case, the creator and the mastermind of the Silk Road was found responsible, was held responsible, criminally responsible there for a single conspiracy that consisted of all the narcotics dealers on that site, so too a defendant here has a single conspiracy that includes a rim between all of the driver-partners, because if he built the Uber app and no driver-partners came, he would not have a platform. It requires each driver-partner to buy into the fixed-price platform, and without that there is no platform. So just as in *Silk Road*, so too here, you have a conspiracy which includes a rim, a horizontal agreement, that is tacit, not explicit, between all of the driver-partners.

Your Honor, there's one more part of the horizontal conspiracy I'd like to touch on that does not get much attention in defendant's brief but is important, and that is,

even if you don't agree with us on *Interstate Circuit's* application or traditional conspiracy common law, the complaint alleges in paragraph 4, and later I believe in paragraph 78 -- make sure I get that right, but it explains later on about a strike in September of 2014, and the strike in 2014 is a horizontal concerted activity on defendant's own terms. The strike involved competing drivers getting together and asking Uber, through defendant, to change the prices, to keep the prices higher. That is uncontestedly horizontal activity. And as alleged in paragraph 4, the defendant, through Uber, then agreed to that price hike, and that completes a conspiracy between the horizontal competitors and the vertical actor, as in *Apple* and as in other cases. Regardless of whether or not Uber and defendant would have preferred a lower price or not, they did not passively acquiesce to that but in fact reached an agreement, as alleged in paragraph 4, to keep the rates artificially high. So that's a standalone conspiracy. It's also further evidence of what the agreement did, what the deal is here, that these drivers do have --

THE COURT: I see that in paragraph 4. Just so that I --

MR. FELDMAN: I'm sorry. I had it backwards. Not 78. It was 87, your Honor. I reversed them.

THE COURT: All right. Let me take a look. Hold on.

This was a conspiracy with Uber drivers in New York

City, it says.

MR. FELDMAN: That's correct, your Honor.

THE COURT: How is Mr. Meyer prejudiced or injured by that conspiracy?

MR. FELDMAN: Mr. Meyer, as alleged in the complaint, used Uber, including in the New York City area, so that's in paragraph 7 of the complaint.

THE COURT: I see. Okay.

All right. Go ahead.

MR. FELDMAN: Turning to the vertical theory, the rule of reason theory, if the Court accepts defendant's position that there is no horizontal concerted activity and that this is merely a vertical agreement, nevertheless the vertical agreement fails the rule of reason test at least on a motion to dismiss, and that's for three reasons, your Honor. The first is there is no procompetitive justification for the price fixing; the second is that there are alleged adverse effects; and the third is that Uber, defendant's company, had market power in the relevant market.

To begin with the procompetitive justifications, in short, this is a case that presents all the evils of *Dr. Miles*, which led to the ban on price fixing in vertical agreements, with none of the saving grace of the *Leegin* case, which found procompetitive justifications to reverse the court's position on a per se ban on vertical price fixing. The argument made by

defendant -- and so far as I can tell, it's the only argument made by defendant -- about procompetitive justifications for this price fixing, is that they are a new market entrant and that is a justification for fixing prices. The Second Circuit, in *United States v. Apple*, for which cert was just denied last week, rejected that argument, a very similar argument. Apple made the argument that the iBooks Store was great for competition. They had evidence that it lowered prices other than the best sellers, and Apple pointed to that as a justification for fixing the prices in vertical agreements with the publishers for best sellers, and the Second Circuit rightly rejected that and said two wrongs basically do not make a right, and the fact that you are a new entrant in a competitive field does not give you the right to fix prices. It's not a justification. The Second Circuit called that --

THE COURT: If it's a vertical conspiracy, it's a conspiracy between whom and whom?

MR. FELDMAN: If it's a vertical conspiracy, it's a conspiracy between the defendant and each of the individual driver-partners, your Honor.

THE COURT: But not the individual drivers among themselves.

MR. FELDMAN: Certainly we argue that there is a conspiracy among the drivers themselves, and that is our first argument.

THE COURT: That's your horizontal.

MR. FELDMAN: That's our horizontal argument.

THE COURT: Yes. But on the vertical, it would be a one on one.

MR. FELDMAN: That's correct, your Honor.

THE COURT: Okay. I just wanted to be sure I understood that.

MR. FELDMAN: The *Leegin* case actually provides a very sharp contrast in terms of procompetitive justification. The *Leegin* case relied primarily on two justifications that were procompetitive. The first was that individual resellers made their own promotional efforts in order to sell a product, and the second was that there was a potential free riding problem that resulted from a disparity in the promotional efforts made by resellers. As a doctrinal matter, we have no resale here, and I think that's conceded, so *Leegin* and its whole construct of minimum resale price maintenance should not apply. But even if it did, the procompetitive justifications don't apply. Uber itself is the one promoting the product. Uber is always the front door for a ride. The drivers themselves are not creating fine showrooms or product demonstrations, which were the examples from the *Leegin* court, in order to bring in riders. Uber is doing all that itself. So there is no procompetitive justification in terms of promotional investment by the drivers.

The second rationale in *Leegin* fails here as well. So the second rationale was there was a free riding problem, that because different sellers of Brighton goods in that case took two different tacks, one of which was promoting the item, putting a lot of money into selling the item, and the other was free riding on those sales by discounting sharply, in that case there was a free riding problem. Here there is no such free riding problem, nor could there be. Again, it's for the same reason. The Uber driver-partners all get their clients, they get their customers through the Uber app. In fact, Uber does not even allow customers to choose their driver. It's all through Uber. So the procompetitive rationales in *Leegin*, which made sense there, simply don't apply here.

Just to return briefly, your Honor, to the horizontal conspiracy, *Leegin* is not in tension with *Interstate Circuit*. *Leegin*, at the end of the opinion, said, we are not addressing the claims of horizontal price fixing between the Brighton dealers and *Leegin*. So as a doctrinal matter, that's not even addressed by Justice Kennedy in the *Leegin* opinion. In any event, *Interstate Circuit* is not purportedly overruled by any Supreme Court opinion. The Supreme Court would tell us if they were overruling a decision, as they did in *Leegin*, by explaining they were overruling *Dr. Miles*. No mention of *Interstate Circuit*. And that's because the two decisions are aimed at very different problems. *Interstate Circuit* is aimed

at the field of competition where competitors have a natural interest in forming a cartel. Uber is a great example. The drivers are in a situation where all boats rise if they can achieve artificially inflated prices. Same with Apple and the publishers, who wanted higher best sellers, which Judge Cote called a classic collective action problem. And so too in *Interstate Circuit*, where all of the film companies wanted higher commissions off of first-run films.

*Leegin* and all resale price maintenance cases that follow *Leegin* present an entirely different scenario. In those cases you have disparity in services, and the competitors themselves would never form a cartel, or virtually would never form a cartel. The high-end retailers aren't all going to get together and decide, we're going to lock ourselves in to a high price. That doesn't do them any good. They're still undercut by the discounters. The discounters would never agree to lock themselves into a higher price, because they could not compete with the high-end retailers. So the *Leegin* case does not confront the opportunism confronted by Judge Scheindlin in the *Laumann v. NHL* case, the Second Circuit in *Apple*, or the Supreme Court in *Interstate*, where interstate was coming in, Apple was coming in, the NHL was coming in and letting competitors do exactly what they dreamed of, forming a cartel that benefited all of them by rising all boats and increasing their revenues.

To return to the vertical conspiracy, there's no procompetitive justification under *Leegin*. The Court can stop there. Under the quick look doctrine, if there are no procompetitive justifications, that's enough. But there's more. There are adverse effects alleged in the complaint, both including higher prices, and that's alleged in paragraphs 89 and 112, and decreased output, and the complaint at paragraph 110 cites studies that show that surge pricing, this phenomenon where defendant's algorithm increases prices up to ten times the baseline number, that surge pricing does not in fact increase output but decreases output, that riders and drivers actually engage in fewer transactions as a result of surge pricing, so those are alleged, your Honor -- did you have a question?

THE COURT: Well, I was struck, and maybe it's somewhere else in the complaint, but you say this is a more sort of technical issue. You say in paragraph 110, "Kalanick's actions have further restrained competition by decreasing output. As independent studies have shown, the result of Kalanick's collusive surge pricing is not, as he claims, to perfectly match supply with demand but instead to remove some demand so that prices stay artificially high and Kalanick reaps artificially high profits."

I wonder, as a matter of pleading, without even referencing what those studies are, whether that's anything

more than just conclusory. Now maybe you cite them somewhere else in your complaint and I missed it?

MR. FELDMAN: We do not. It would be simple for us to amend our complaint if that is a sticking point.

THE COURT: Well, I'm not sure. I doubt that that will be a definitive sticking point, given all the other issues that are out here, but since you were relying on it in your argument right now, I do think probably it's not adequately pled in its present form.

MR. FELDMAN: Your Honor, I can mention a few of the studies, if you'd like to hear about them.

THE COURT: Well, why don't you do this. Send me a letter -- and we'll fix a time for this at the end of the argument -- giving what studies you're relying on, and your adversary can then respond to that letter if it wishes to. But go ahead.

MR. FELDMAN: We'll do that, your Honor.

THE COURT: Okay.

MR. FELDMAN: So in the Second Circuit the showing of adverse effects is, again, a sufficient showing to survive a motion to dismiss on the rule of reason, and that's true under *Capital Imaging Associates*, which we cite in our papers.

But there's yet another basis for this complaint to survive a motion to dismiss, and that's the existence of Uber's market power. As the Second Circuit has explained, this is a

deeply fact-intensive inquiry and usually not properly resolved on a motion to dismiss. Here, however, the complaint lays out that Uber had 80 percent of the market power in the e-hailed ride share market, and the question -- and there's not a disagreement on this question -- about what constitutes a reasonable substitute in that market is whether buyers would respond to a slight increase in price by shifting to another substitute, and the complaint alleges, goes through an explanation for why the substitutes that the defendant cites -- taxis, car services, buses, and walking -- are not actual substitutes in that market; that consumers would not respond to slight increases in the Uber pricing by heading out on foot or waiting for the bus, or even taking a taxi.

And the taxi example is probably the one that merits the most attention. Taxis are regulated, which provides different benefits, including perceived safety benefits and attractions to consumers that is different than the ride sharing market that is not regulated. In addition, there are features throughout the Uber app, like most importantly perhaps the ability to hail a Uber driver by application, by smartphone app, rather than going out in a snowstorm or the rain on the street to hail a taxi; and the ability also to pay in advance, to prearrange payment so you don't have to worry about having anything but your smartphone when you're in an Uber ride share car versus a taxi, where you need a credit card that's working

and/or cash. There are other features like car tracking and rating systems that have not traditionally existed with the taxi industry.

The opposition brief explains, or quotes a DC Circuit opinion, *FTC v. Whole Foods*, that it's often the case that sufficiently innovative retailers can constitute a distinct product market even when they take consumers from existing retailers, and that's an important insight here because obviously Uber has been taking consumers from taxis, but that does not mean they are not a distinct market. They're a distinct market because of the great attractiveness of the app itself.

One last point on taxis, your Honor, which is that in the complaint at paragraph 105, we cite Uber itself as recognizing that they are not competing against taxis. The Second Circuit, in *Todd v. Exxon*, at 275 F.3d 206, explained that this sort of industry recognition is well-established probative value in defining the market. The defendant, or in this case Uber's, perceptions of the market are certainly telling and important under Second Circuit caselaw in defining the market.

THE COURT: Of course, and again, this is sort of a technical point, but the quote from Uber is not necessarily a quote from Mr. Kalanick.

MR. FELDMAN: That's correct, your Honor, which is why

the argument I'm making is that industry recognition is significant. Certainly Mr. Kalanick and Uber are in the same industry. And so the industry recognition is the point I'm making, or plaintiff is making. The quote I read you was about a defendant, and yes, that is not exactly true here because Mr. Kalanick is the defendant, Uber is not.

THE COURT: Okay. Very good. Thank you so much.

Let me hear from defense counsel on rebuttal.

MR. ISAACSON: Your Honor, let me begin on the rule of reason point, does this complaint survive in the absence of horizontal conduct, because the answer is no. And the distinction here is between horizontal and vertical conduct and per se, quick look, and rule of reason, right? Just because you utter the words "rule of reason," does not mean you have alleged an illegal vertical conspiracy. This complaint does not do that. This complaint alleges solely a horizontal conspiracy. It then says that that conspiracy is per se illegal and that in the alternative it would fail under quick look or rule of reason. That's in Count One of their complaint at paragraphs 127 through 130.

Now this complaint simply does not have a fallback count where they say, okay, assuming that there is no horizontal conspiracy, we will now describe to you an illegal vertical relationship. It is not in there, despite the fact that they took a second crack at this. Now there's reasons for

that. This would be an incredibly implausible complaint alleging a vertical relationship against Mr. Kalanick as opposed to Uber, but set that aside, in the wake of the law on vertical relationships.

Counsel talks about how they say there's no procompetitive benefits to this relationship. Uber, the technology company, comes into existence, Uber driver-partners then begin to compete against taxi and other commercial driving services and they take business away, according to counsel. It is by definition a new entrant in the field who counsel says is competing. That is at the heart of what is a procompetitive benefit. They would not be able to plead around that. He says there are adverse effects. Now the relevant adverse effects here would be on competition, not just things that we don't happen to like on any particular day. And this complaint is devoid -- for example, surge pricing, which is alleged to be a higher price in a higher demand time. There's no restraint on competition or effect on competition that is alleged from surge pricing. And I agree that the one paragraph of the complaint isn't going to be the rise or fall of this, but even the complaint your Honor pointed to that says this reduced output says, in actuality, there's reduced demand, which is not the same thing as reduced output, because reduced demand is a function of consumer choice. So if the weather is terrible and there's not sufficient supply, the price goes up, supply goes

up, with the higher price, but some people say: I'm going to stay home. I don't want to pay the price. That is not a restriction on -- that's not a competitive effect if someone says: I want to stay home, instead of taking an Uber driver-partner.

And then on the last piece, which is in the complaint but inadequately, as to whether there would be a relevant market, you would have to directly confront whether that has been pled if you were actually handed a complaint alleging an illegal vertical relationship as opposed to an illegal horizontal relationship, and there, as we've said in our briefs, it fails because it doesn't take into account the reasonable substitute of who's competing with the Uber driver-partners. Now Uber is a technology company, right? It facilitates Uber driver-partners, who then compete and work in transportation, and operate in transportation markets. That's not a remarkable statement for Uber to say we don't directly compete with the taxicab drivers; it's the Uber driver-partners that do. But it's indisputable -- counsel said it -- that the driver-partners have taken away business from the taxicabs. Which means -- and there's no explanation of why this is a different market other than the fact we have an app and it works well. Now that's an attempt to change this -- if you were to write a complaint with a vertical relationship, you'd be writing a single brand case. You would be saying, this

market is defined by the quality of apps in this market, which makes it a better service, providing better products. It would be the same thing if they then sued a very high-quality car service and said it's a great car service and that's all we need to do for a relevant market. A lot of the propositions, for example, when counsel was discussing *Leegin*, are not just antithetical to antitrust doctrines as it's developed. These are legitimately dangerous propositions for competition. Counsel is actually arguing against a company coming in and saying that, all right, we're going to work with driver-partners in a contracting relationship and we are going to have a suggested price or a mandatory price, however they want to characterize it, and that's going to be the best way to operate, for you driver-partners to operate in competition with the other driving services that are out there, that that is somehow forbidden by the antitrust laws. While this isn't in the complaint, he starts arguing, well, there's no free riding risk here. *Leegin* talked about, we want to promote new entrants, we want to have single brand competition. And now we have Uber driver-partners who get to associate with the Uber brand, all right, and to the extent that there are suggested prices or mandatory prices -- which, frankly, out there in the world people are saying lower prices, not increased prices, and that's what the taxicab drivers had to say, but set that aside, if you're going to have a certain price, you can do that to

maintain the quality of your brand. And that goes back to *Colgate* at the beginning of this century. They're going to say, if you're going to operate with us in a vertical relationship, we want to maintain the power of a brand and sell a successful product. We don't want to have a crummy car at a crummy price and these sorts of things in order to build that. And then you know what, another company can come in with an app that says, all right, we'll let you negotiate. You have a company like Uber, a technology company, that says, all right, we'll build the price into the app because people will get into the car and they can say, I'm not negotiating price, this is great. In their world all companies would be required to say at the beginning, We have to negotiate the price; that McDonald's can't have suggested prices for any of its franchisees for the Big Mac. When you go into McDonald's, you have to say, All right, here's what I'm going to pay today, because that's freedom, as he describes it. And what that actually is are restraints, it's regulation and restraints in competition and the opposite of freedom. You're getting freedom, as he would describe it, by disallowing complaints such as this.

The hub and spoke conspiracy and the *Silk Road* thing is even an odder analogy. Again, we are in the world of antitrust, which I'm not always able to detect from counsel's argument.

THE COURT: Well, but I think the point he's making there, the law of conspiracy, which of course goes back to common law times, is not, in its general principles, any different whether it's an antitrust conspiracy, a narcotics conspiracy, or any other kind of conspiracy. It is really a subset of the law of agency and in that sense is governed by the same basic concepts throughout, so I don't think the mere fact that the *Silk Road*, for example, case is not in the antitrust world is the end of the story.

MR. ISAACSON: Well, I do think it matters because here's the way conspiracy law and antitrust law does not overlap, because a horizontal conspiracy to fix prices is per se illegal, all right? And a vertical relationship is not. A vertical --

THE COURT: That's true, but that's a function of the fact that when the Sherman Act was passed in 1890, it was originally attacked in the famous case of *United States v. Nash*, a little bit before your time -- I think it was 1910 or something like that -- on the grounds that it was unconstitutionally vague because what's meant by a restraint of trade. That's a pretty broad term. And the Supreme Court, in an eight-to-one decision by some guy named Oliver Wendell Holmes, said, well, there are two answers to that. One is the term is a term of art because it really is a common law term that carries a certain meaning developed in the common law, but

he didn't want to stop because then it would have been frozen, the Sherman Act, as of what the common law meant in 1890. He said, and the court said, However, we will leave it to the Department of Justice and then ultimately the courts to work out sort of rules that give more precise meaning to this otherwise potentially vague term. And so along came the rule of reason, along came per se, and all those other things you're referring to. But it wasn't because the law of conspiracy was being changed or given a unique meaning; it was because they had to give more specificity to what was meant by the term "restraint of trade."

MR. ISAACSON: Yes. And my point is really, counsel is mushing together all illegal acts, so if we have a website where all the vertical and horizontal actors are involved in the drug trade or in the murder for hire trade, which I think is the *Silk Road* case, you don't stand up and say, I'm not part of that conspiracy because I'm in a vertical relationship. In the antitrust -- and what he's trying to do by saying this is one conspiracy is to avoid the line of cases with *Leegin* going back to the beginning of the century with *Colgate* that say, no, look, vertical relationships, properly done, are innocent behavior, and to use the analogy to the drug trade, where everybody's involved in illegal activity and then rope them into the conspiracy, and that's my complaint with the use of that analogy in this case.

THE COURT: Okay.

MR. ISAACSON: So finally, the *Interstate Circuit* doctrine, which is being much abused here. The doctrine relates to when a horizontal agreement is facilitated by a vertical actor. For example, in *United States v. Apple*, the Second Circuit affirmed Judge Cote's findings that Apple was involved, the publishers, the horizontal conspirators, were involved in many, many communications about price and that Apple was also involved in those communications and that they set up a contract that I'll explain in a minute that caused the publishers to all act together. Now that's an application of *Interstate Circuit*. It is the defining of a horizontal conspiracy with lots of evidence of it and then actual involvement in facilitation -- that's the word that is used by the Second Circuit -- of that conspiracy by the vertical actor. And here, we have a complaint devoid of any communications from Mr. Kalanick, facilitating any type of conspiracy, whether it be vertical or horizontal.

Now the two prongs, which are not being precisely laid out for the Court, of *Interstate Circuit*, first, a party entered a vertical agreement on the condition that its competitors do the same. Now the condition there is amongst the horizontal competitors. Counsel wants to make this, well, if the actor on top makes it attractive such that everybody below says, gee, that's a good idea and I can see they're doing

this too, that that somehow meets the first prong of the doctrine, and that's not it, because it's the horizontal actors, in this case the driver-partners, who would have a condition amongst themselves that we're all joining in this together. And the complaint is utterly devoid of that. Instead what you have is an attractive relationship, and like I said, the example is that all McDonald's franchisees would potentially be involved in the conspiracy end of this. So in the *Apple* case, for example, the Second Circuit and district court were concerned that the contract offered by Apple had a pricing provision, an MFN, which basically amounted to, if Amazon charged 9.99 for an e-book, that everybody could lower the prices, and this was not what the publishers wanted or what Apple wanted, according to that case. But by having that in everybody's contract, it created the incentive for the publishers to move Amazon to an agency model where they weren't in charge of the prices, and the decisions expressly say that the contract was structured to cause the horizontal actors to move another vertical actor to the agency relationship. There's nothing like that here. And the other cases that are being cited by counsel all have express conditions where you say, we're the horizontal actors, the driver-partners here, we're all saying by agreement we're not going in unless you're going in.

Now the second part of it is the vertical agreement,

that under the *Interstate Circuit* doctrine, if the vertical agreement was against the parties' own immediate economic self-interest -- and here we're just getting labels -- you must act together. All the boats rise. All he's describing is a beneficial relationship. I think this is what is missing. He says, a plan that they hatched together falls under this prong. And of course that's what's utterly missing here. There's nothing in the vertical agreement that is against their own economic interests; in fact, it's all in their economic interests and makes perfectly normal logical and economic sense, which is why you have more competition from the point of view of the people who might want to get in the cars.

THE COURT: All right. That's all very helpful, and I'm going to have to cut you off because I have to teach a class every week at Columbia Law School on some subject called class actions, so I need to go leave for that in about five minutes. I will give your adversary five minutes but no more to respond.

MR. ISAACSON: Can I say one thing about the strike allegation?

THE COURT: Yes, go ahead.

MR. ISAACSON: Paragraph 87. There's no allegation that the plaintiff bought during that month -- there's no specificity of any conduct by Mr. Kalanick. There's a general legal conclusion based upon information and belief, but even if

you were to accept a plausible allegation like that, that that allegation is plausible, that does not support the count of the complaint of a price fixing conspiracy amongst all those Uber drivers. All you have is a limited group of drivers within one area, for one type of car, who said, in a vertical relationship, we're protesting your prices, and then in that situation the company is alleged to have acceded to that. Now if that was an antitrust violation, Uber would be a victim and not a participant in the conspiracy. But all it's indicating is adverse conduct by one small group of drivers, driver-partners, and not the sprawling conspiracy that's being described here.

THE COURT: Thank you very much.

MR. ISAACSON: Sorry I took more than a minute.

THE COURT: I'll hear very briefly from the plaintiff's counsel.

MR. FELDMAN: I'll make five points as briefly as possible, your Honor.

The first is that the complaint pleads both horizontal and vertical, which defendant understood in moving --

THE COURT: Well, forget what they understood. Show me, because what he just pointed out, which I had not focused on previously, is, forget about what's in the first --

MR. FELDMAN: Paragraph 130, your Honor.

THE COURT: 130. Okay. Let me take a look at that.

MR. FELDMAN: Right. So the Sherman Act claim is a single claim. We know of no ruling --

THE COURT: "In the alternative, Kalanick is also liable under Section 1 of the Sherman Act under a quick look or a rule of reason analysis." But that's pretty, to say the least, barebones, and while you have in paragraph 120 the standard that all the allegations are incorporated by reference, when you look at the rest of your allegations under first cause of action from 120 through 133, they all are spelling out with some degree of specificity the horizontal per se arrangement that you then pick up the stuff for later. So it may not be per se, but where is, in that one sentence in paragraph 130, a meaningful allegation of a specified vertical count?

MR. FELDMAN: Your Honor, as you point out, of course paragraph 120 incorporates the rest of the allegations in the complaint. Those spell out in detail a vertical agreement. In fact, defendant said the only thing they spell out is a vertical agreement between the defendant and the drivers. In addition, there are portions of this complaint that are in there only for support of the vertical rule of reason theory. Those include paragraphs 94 through 108, which lay out a market, and a market definition, which we need not do under a horizontal price-fixing conspiracy; and paragraphs 109 through 112, which lay out the adverse effects prong of the vertical

price-fixing theory. So together the complaint very clearly alleges a vertical arrangement in addition to a horizontal conspiracy. It lays it out in quite a bit of detail and then lays out the other components of a typical rule of reason complaint, incorporates those by reference, and then specifically says in paragraph 130 that in the alternative, plaintiff is pleading a rule of reason case.

THE COURT: All right. Go ahead to your other points.

MR. FELDMAN: Your Honor, the second point is that counsel made the argument that this is *Leegin* because it's just like a manufacturer reselling something. This is not like *Leegin*. Uber and defendant don't produce anything that is resold to riders. Uber itself, in other litigation, has used the metaphor of becoming a concierge, taking people in and pointing them to drivers. Well, it's the concierge who is fixing the prices between all of the drivers, and *Leegin* does not apply for that reason.

THE COURT: I should mention to our court reporter that *Leegin* is spelled in this context L-E-E-G-I-N as opposed to L-E-G-I-O-N, which you might have otherwise expected.

THE REPORTER: Thank you.

THE COURT: Okay. Go ahead.

MR. FELDMAN: Thank you, your Honor. I should have done that.

THE COURT: That's all right.

MR. FELDMAN: Defense counsel also took a position that this complaint states a dangerous proposition and in doing so, defendant is ignoring *Interstate* and the facts alleged in the case. We don't contest that this could become -- defendant could turn Uber into a unilateral firm, a single entity under the *American Needle* rule, and, if so, certainly could set its own prices. And likewise the facts here are not the facts in the hypothetical of a company selling directly to consumers and taking on all the risk of doing so and then reselling to cars and particular drivers. If we had those scenarios, we probably would not be here, but that's not the case.

THE COURT: No, they're saying if they have to live with the consequences of not portraying themselves as that kind of company --

MR. FELDMAN: Exactly, exactly. The actual dangerous proposition here is if we fail on this motion to dismiss and the case is dismissed, it opens the door for any price fixer to create an app to do that as well. A price-fixing app, somebody could come in, organize a cartel, and take a cut, and there would be no principle stopping them from doing that.

The fourth point, your Honor, is that plaintiff is not avoiding *Colgate*. This simply isn't a *Colgate* case. *Colgate* has to do with the refusal to deal. If Uber suggested prices to its drivers and cut those off who didn't charge the price, we might be in a *Colgate* scenario and the *Colgate* doctrine may

apply, but that can't happen because Uber controls the pricing and they've all agreed to use that pricing. It's not a refusal to deal case. There's an actual conceded agreement, at least at the vertical level.

Finally, plaintiff is not abusing the *Interstate Circuit* doctrine. In fact, the Supreme Court was very clear in *Interstate Circuit*, in pages 221 through 222, that they were not deciding at the Supreme Court that there was evidence of express horizontal agreement, as defense counsel suggests. Those weren't the facts accepted by the Supreme Court. In fact, on page 221, the Supreme Court states that everyone agreed in the case that if there had been evidence of a horizontal agreement between the film distributors, they would lose in the Supreme Court. The Supreme Court on the next page says, we don't have to assess the sufficiency of the evidence because the legal effect -- even without the express agreement, the legal effect of this common motive to conspire an open invitation to all of the horizontal competitors accepted because everybody else was accepting, the legal effect of that was concerted action among the competitors. That's what *Leegin* actually means. It does not stand for the proposition cited by defense counsel.

THE COURT: All right. Thank you very much, and thank you to both counsel for excellent argument. It's been a little while since I had an antitrust case, so this is very

interesting to me. I did have an antitrust course in law school, but my professor was some guy named Stephen Breyer. I don't know whatever happened to him. But it is really interesting stuff. And so I will get you a bottom-line ruling by the end of March. I'm sure I will not be able to get you the opinion. If I grant the motion, judgment will not be entered until I write the opinion. If I deny the motion, then we'll have to set new dates under an amended case management plan to move forward with discovery and the like. But either way I will get you at least the bottom line by the end of March.

Anything else anyone needs to raise today?

MR. FELDMAN: Not for plaintiff, your Honor. Thank you.

MR. ISAACSON: Thank you, your Honor.

THE COURT: Thanks very much.

(Adjourned)